



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

July 12, 1996

The Honorable Tim Curry
Criminal District Attorney of
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

Letter Opinion No. 96-072

Re: Fees for filing petition for preindictment writ of habeas corpus, and a related question (ID# 36799)

Dear Mr. Curry:

You ask whether the district clerk may charge the following kinds of fees for filing a petition for preindictment writ of habeas corpus: clerk fee, court reporter service fee, law library fee, judicial fee, alternative dispute resolution fee, records management and preservation fund fee, security fee, and appellate judicial system fee.¹ If these fees may be charged, you ask whether the trial court may waive them.

Section 51.317 of the Government Code provides in part:

(a) The district clerk shall collect at the time the suit or action is filed the fees provided by Subsection (b) of this section for services performed by the clerk.

(b) The fees are:

(1) for filing a suit, including an appeal from an inferior court and for filing a petition for preindictment writ of habeas corpus \$45

Gov't Code § 51.317(b)(1).² Thus, the general filing fee may be charged for filing a petition for preindictment writ of habeas corpus.

¹A preindictment writ of habeas corpus is filed to seek an individual's release from custody while he or she is awaiting grand jury proceedings or indictment. Attorney General Opinion DM-295 (1994) at 1.

²Attorney General Opinion DM-295 held that a prior version of section 51.317 of the Government Code did not authorize the collection of a fee for filing an application for a preindictment writ of habeas corpus. The legislature subsequently amended section 51.317 to authorize this fee. Act of May 27, 1995, 74th Leg., R.S., ch. 641, § 1.01, 1995 Tex. Gen. Laws 3513, 3513.

Section 51.601(a) of the Government Code, which provides for the court reporter service fee, states as follows:

(a) The clerk of each court that has an official court reporter shall collect a court reporter service fee of \$15 as a court cost *in each civil case* filed with the clerk to maintain a court reporter who is available for assignment in the court. [Emphasis added.]

This provision applies only to the filing of a civil case. Although section 51.317 of the Government Code now expressly provides a fee for filing a petition for preindictment writ of habeas corpus, it does not identify a habeas corpus proceeding as a civil suit.³ As we noted in Attorney General Opinion DM-295, state and federal courts have in various circumstances considered habeas corpus proceedings to be civil, criminal, or a unique, unclassifiable remedy.⁴ The preindictment habeas corpus proceeding does not fit into the usual categories found in filing fee statutes and it is not a civil proceeding for purposes of filing fee statutes.⁵ The legislature resolved this problem of characterization for purposes of section 51.317(b) by expressly including an application for preindictment habeas corpus in that filing fee provision. In our opinion, filing fee provisions apply to filing a petition for a preindictment writ of habeas corpus only when the legislature has made it clear that a particular fee provision should apply. Accordingly, the district clerk may not charge the court reporter fee provided for civil cases by Government Code section 51.601(a) when filing a petition for a preindictment writ of habeas corpus.

Some of the other fees you inquire about are also applicable only to civil cases. These are the law library fee, Local Gov't Code § 323.023(a), the alternative dispute resolution fee, Civ. Prac. & Rem. Code § 152.004(a), security fee, Local Gov't Code 291.008(a), and the appellate judicial system fee, Gov't Code § 22.2031(b). Because

³Attorney General Opinion DM-295 stated that section 51.317 of the Government Code applied only to a suit or action of a civil nature. Attorney General Opinion DM-295 (1994) at 2. The subsequent inclusion in section 51.317 of a fee for filing a preindictment writ of habeas corpus does not mean that the legislature considers the petition for a preindictment writ of habeas corpus to begin a civil proceeding. It may have included this fee in section 51.317 merely because that provision was the subject of Attorney General Opinion DM-295.

⁴See Attorney General Opinion DM-295 at 11 (1994) and authorities cited therein. Texas courts, because of the separate court of final appellate jurisdiction for criminal matters, have characterized particular habeas corpus proceedings as civil or criminal for purposes of jurisdiction. A habeas corpus proceeding to remove an unlawful restraint is regarded as "criminal" if the restraint arises out of a violation or supposed violation of a criminal law, and as "civil" if it arises in connection with civil proceedings. *Ex parte Morris*, 349 S.W.2d 99, 101 (Tex. 1961); *Legate v. Legate*, 28 S.W. 281, 282 (Tex. 1894); *Ex parte Davis*, 542 S.W.2d 192, 198 (Tex. Crim. App. 1976); *State v. Morris*, 208 S.W.2d 701, 703-04 (Tex. Civ. App.-Waco, 1948, writ ref'd n.r.e.).

⁵*Cf.* Attorney General Opinion V-1071 (1950) (habeas action is criminal or civil for purpose of filing fee statute depending on whether or not restraint is due to alleged violation of criminal law).

these fees are applicable only to civil cases, the district clerk may not charge them for filing a preindictment writ of habeas corpus.

The judicial fee is collected pursuant to section 51.701(a) of the Government Code, which provides as follows:

In addition to each fee collected under Section 51.317(b)(1), the district clerk shall collect a \$40 filing fee to be used for court-related purposes for the support of the judiciary.

The district clerk is required to send these fees to the comptroller for deposit in the judicial fund created by section 21.006 of the Government Code.⁶

The \$40 filing fee required by section 51.701(a) of the Government Code is collected in connection with each fee collected under section 51.317(b)(1). Accordingly, the district clerk must charge the \$40 judicial fee for filing a petition for preindictment writ of habeas corpus.

The records management and preservation fund fee must be collected by the district clerk pursuant to section 51.317(b)(5) of the Government Code. A single enactment established a comprehensive plan for funding records management and preservation in the counties by providing for the records management and preservation fund and setting fees to be collected by court clerks for placement in the fund.⁷ The fund is created pursuant to section 203.003 of the Local Government Code, which provides in part:

The commissioners court of each county shall:

...

(6) establish a records management and preservation fund for the records management and preservation fees authorized under Sections 118.052, 118.0546, and 118.0645, Section 51.317, Government Code, and Article 102.005(d), Code of Criminal Procedure, and approve in advance any expenditures from the fund, which may be spent only for records management preservation or automation purposes in the county.

The first three statutes cited in the above provision require the county clerk to place fees collected in civil court actions and probate court actions in the records

⁶Gov't Code § 51.701(b).

⁷Act of May 30, 1993, 73d Leg., R.S., ch. 675, §§ 1 - 6; 1993 Tex. Gen. Laws 2506, 2506-09 (amending Local Gov't Code §§ 118.052, .0546, .0645, 203.003; Gov't Code § 51.317(b); and Code Crim. Proc. art. 102.005).

management and preservation fund.⁸ Article 102.005(d), Code of Criminal Procedure, requires a defendant convicted of an offense in a county court, a county court at law, or a district court to pay to the clerk of the court a fee of \$10 for records management and preservation services performed by the county. Section 51.317(b) of the Government Code, the provision you inquire about, requires the district clerk to collect the following filing fees:

(1) for filing a suit, including an appeal from an inferior court
and for filing a petition for preindictment writ of habeas corpus . \$45.

...

(5) for the records management and preservation fund \$5.

In our opinion, the records management and preservation fee applies to any filing made by the clerk pursuant to subsection 51.317(b)(1) of the Government Code. Accordingly, this fee is to be collected in connection with the filing of a petition for preindictment writ of habeas corpus.

You ask whether the trial court may waive the fees that may be charged upon filing a petition for preindictment habeas corpus. In Attorney General Opinion DM-295 this office stated that "[t]he denial of relief from unlawful imprisonment on the basis of even momentary inability to pay a filing fee would conflict with the purpose of habeas corpus."⁹ We concluded that the district clerk may not refuse to file the application for a writ for nonpayment of an applicable fee.¹⁰ Moreover, the judge trying a cause under habeas corpus has long had discretion to award costs against the person to whom the writ was directed, against the person seeking relief, or to award no costs at all.¹¹

⁸Local Gov't Code §§ 118.052 (schedule of fees to be collected by county clerk in civil court actions and probate actions); .0546 (records management and preservation fee under section 118.052 must be paid at time of filing civil case or ancillary pleading thereto); .0645 (records management and preservation fee under section 118.052 must be paid at time of filing any probate case).

⁹Attorney General Opinion DM-295 (1994) at 13.

¹⁰*Id.*

¹¹Code Crim. Proc. art. 11.50; see *Ex parte White*, 198 S.W. 583, 594 (Tex. Crim. App. 1915).

S U M M A R Y

Filing fees are applicable to filing a petition for a preindictment writ of habeas corpus when the legislature has made clear its intent that a particular fee provision should apply. The district clerk may not charge the following fees for filing a petition for a preindictment writ of habeas corpus: the court reporter fee, Gov't Code § 51.601(a); the law library fee, Local Gov't Code § 323.023(a), the alternative dispute resolution fee, Civ. Prac. & Rem. Code § 152.004(a), the security fee, Local Gov't Code § 291.008(a); the appellate judicial system fee, Gov't Code § 22.2031(b).

The following fees apply to the filing of an application for a preindictment writ of habeas corpus: the district clerk filing fee, Gov't Code § 51.317(b)(1); the records management and preservation fund fee, *id.* § 51.317(b)(5); and the judicial fee, *id.* § 51.701(a). The district clerk may not refuse to file the application for the writ for nonpayment of such fees when the applicant is unable to pay.

Yours very truly,

A handwritten signature in black ink that reads "Susan Garrison". The signature is written in a cursive, flowing style.

Susan Garrison
Assistant Attorney General
Opinion Committee